Supreme Court, U.S.
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No. 92-0092

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

BRODERICK INVESTMENT COMPANY, a partnership and successor to Broderick Wood Products, Inc.; THE COLORADO NATIONAL BANK OF DENVER, as trustee; and THE FIRST INTERSTATE BANK OF DENVER, N.A., as trustee,
Petitioners,

v.

THE HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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August 20, 1992

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RULE 29.1 LIST

The list required by Sup. Ct. R. 29.1 is included in the petition for a writ of certiorari, as supplemented by letter to the Clerk dated July 14, 1992. No amendments to the list are necessary at this time.

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REPLY BRIEF OF PETITIONERS

Respondent argues that this case "does not present an issue of federal law, a conflict of law among the circuit courts, or any other reason supporting Supreme Court review . . . ." Opp. 5. On the contrary, the petition presents two highly significant questions of federal law. First, the Tenth Circuit departed from Erie R. Co. v. Tompkins, 304 U.S. 64 (1937), posing an issue of federal law whose importance is enhanced by the distinctive features of this case. Pet. 9-10. Second, the Tenth Circuit's remedial ruling conflicts directly with this Court's precedent. Pet. 17. That ruling therefore unquestionably presents a well-established basis for certiorari review. Sup. Ct. R. 10.1(c).

I. The Court Of Appeals Departure From *Erie* Warrants This Court's Review.

1. Respondent claims (Opp. 6) that petitioners ask the Court to "create federal common law" and to "provide a uniform interpretation of the law of various states on the pollution exclusion . . . ." Petitioners seek no such ruling. Rather, petitioners seek to enforce the principle -- grounded in Erie -- that federal courts are not free to depart from state law and to fashion their own interpretation of the pollution exclusion clause. As demonstrated in the petition (Pet. 11-15), the Tenth Circuit did not undertake the second step of the analysis that Colorado law mandates in the interpretation of an exclusionary clause. Respondent offers no basis in Colorado law for upholding the Tenth Circuit's decision (Opp. 6-8), citing instead cases from other jurisdictions that address entirely distinct issues under the pollution exclusion clause. See infra at ¶ 3. Respondent thereby confirms that the Tenth Circuit's approach cannot be defended under Colorado law and was a violation of Erie.

2. Respondent's suggestion that choice of law principles "preclude any real concern with forum shopping in any case, and . . . especially . . . here" (Opp. 6 n.3) is without merit. If choice of law principles alone afforded sufficient protection against forum shopping, then Erie itself was wholly unnecessary. If anything, the Tenth Circuit's decision, and respondent's inability to defend it under Colorado law, illustrates the fallacy of respondent's argument. Here, the fact that Colorado law was applicable was meaningless because the Tenth Circuit chose not to follow it.

3. Respondent next attempts to paint Broderick as an intentional polluter (Opp. 7; see also id. 2-3) and the Tenth Circuit's opinion as consistent with the "overwhelming weight of authority" (Opp. 7). Respondent's factual allegations were soundly rejected by the jury which, after hearing all of the evidence respondent cites and all of the arguments it advances, specifically found that Broderick neither expected nor intended the release or escape of wastes from the ponds or the damage to the groundwater. Special Verdict ¶ 2(A) through (H). This key factual distinction is one of the reasons why none of the cases on which respondent relies (Opp. 7 n.5; id. at 8) has any application here. Unlike this case, respondent's cases either involved knowing, intentional pollution, or they held that the "sudden and accidental" phrase in the pollution exclusion has a temporal component that cannot be met by waste disposal practices occurring over time. Here, by contrast, the jury's verdict precludes any suggestion of knowing, intentional pollution, and Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1090-92 (Colo. 1991), establishes that in Colorado, the phrase "sudden and accidental" does not have a temporal component and is satisfied by proof that the discharge was neither expected nor intended by the insured.

Thus, respondent's argument, and the cases it cites, are a smoke screen designed to evade the real issue in this case. The issue is whether the phrase "discharge, dispersal, release or escape" is subject to any reasonable interpretation other than the one the Tenth Circuit adopted. Respondent does not even contest (Opp. 6-9) petitioners' showing of reasonableness (Pet. 12-15), further confirming the Tenth Circuit's departure from Erie.

4. Respondent's attempt (Opp. 8 n. 6) to distinguish New Castle County v. Hartford Accident & Indemnity Co., 933 F.2d 1162 (3d Cir. 1991), is equally futile. In its first opinion, the Third Circuit's analysis plainly focused on the secondary discharge, i.e., from the landfill into the groundwater. 933 F.2d at 1169, 1199-1203. On appeal after remand, the Third Circuit did not alter this analysis; rather, it simply held that coverage was barred because the district court had found that the insured had intended the discharge of leachate from the landfill. New Castle County v. Hartford Acc. & Indem. Co., 1992 WL 174419, at 1, 6 (3d Cir. July 28, 1992). Here, by contrast, the jury found that the secondary discharge, i.e., from the ponds into the groundwater, was neither expected nor intended by petitioners. Under New Castle, then, petitioners were entitled to coverage. This disparity in the approaches of federal circuit courts en-

courages, not hinders, the forum shopping that Erie was intended to prevent.

II. The Court Of Appeals Choice Of Remedy Conflicts With This Court's Precedent.

1. Respondent claims that petitioners waived their challenge to the Tenth Circuit's erroneous remedy by not raising it in their answer brief. This argument finds no support in the only case respondent cites, Neely v. Eby Constr. Co., 386 U.S. 317 (1967). Neely addresses the very different question of an appellate court's power to direct the entry of judgment for a verdict loser who did file a motion for judgment n.o.v. Indeed, precisely because the filing of such a motion grants such power to the appellate court, Neely identifies occasions when the verdict winner may make a contingent request for a new trial. 386 U.S. at 328-29. Neely does not apply here because the key prerequisite -- a timely-filed motion for judgment n.o.v. -- never occurred. As the cases cited by petitioners (Pet. 17) demonstrate, the absence of such a motion, or of a renewed motion for directed verdict, precludes an appellate court from directing the entry of judgment for the verdict loser. In such a case therefore, there is no reason for the verdict winner to make a contingent request for a new trial -- the risk that judgment could be entered against the verdict winner simply never arises.

In any event, this Court's rulings establish that because no such motions were filed here, the Tenth Circuit simply had no power to direct the entry of judgment for respondent on the issue of coverage for the ponds. Pet. 17. Petitioners' challenge to the Tenth Circuit's usurpation of power, like a jurisdictional challenge, could not be waived. Finally, petitioners raised the issue at the earliest possible opportunity, i.e., in their petition for rehearing following the panel's decision directing entry of judgment for respondent, and the panel addressed it, modifying the earlier opinion to grant a partial new trial on the issue of coverage. Pet. App. 16a-17a.

2. Respondent's reliance on 28 U.S.C. § 2106 (Opp. 9-10) is equally erroneous. The statute is simply a broad grant of general authority to the federal appellate courts; it says nothing about the exercise of that authority in a particular case. The statute does not, and could not, confer on the circuit courts power that the Seventh Amendment of the Constitution denies them.

3. Respondent's only response to petitioners' showing (Pet. 17-18) that the Tenth Circuit's ruling as to the ponds conflicts directly with this Court's decisions is to assert that "this Court's role is not to correct error, but to resolve conflicts among the lower courts" (Opp. 10). Respondent overlooks petitioners' showing that the Tenth Circuit's ruling squarely conflicts with decisions of both this Court and other circuit courts. Pet. 17-18. The fact that this Court has resolved the issue does not mean that the Tenth Circuit's non-compliance, and the resulting violation of petitioners' Seventh Amendment rights, should be ignored or overlooked. Rather, it warrants summary reversal of the Tenth Circuit's ruling, and a remand with directions that the new trial should include the issue of the application of the pollution exclusion to the containment ponds.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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